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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 575

E. E. CONNER, ET AL.,
Petitioners,

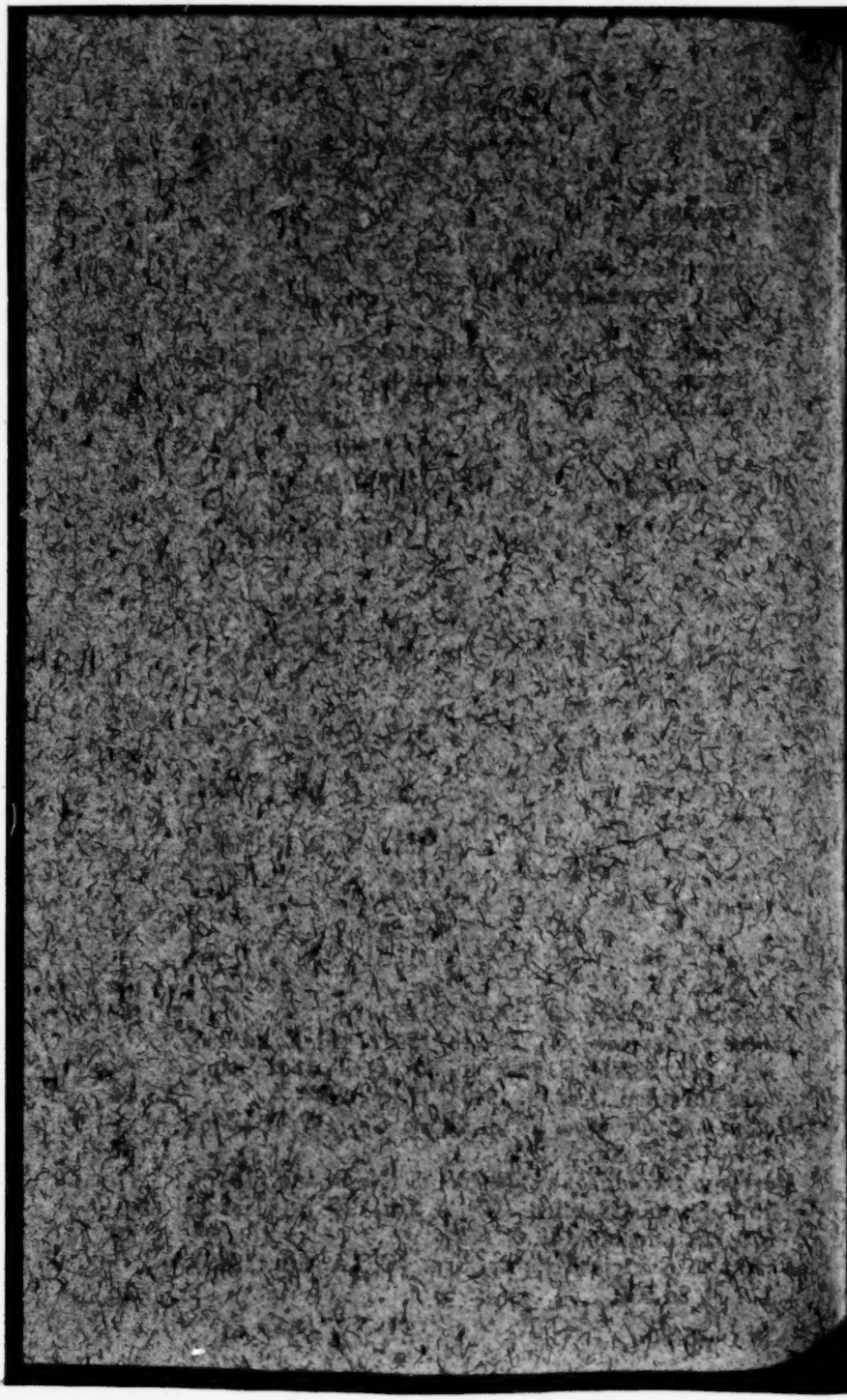
vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

James W. Craven,
Thomas Shelton Jackson,
Rhey A. Gwyer,
Counsel for Petitioners.

Gregory R. Stewart,
Carl G. Lutz,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 575

R. E. CONNER, KENNETH L. KNITTER, AND VINCENT L. PETENBRINK, SUING ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Petitioners,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, E. W. WILSON, CHARLES F. PUSEY, J. H. ALLERS, JOSEPH M. DECKER, C. A. LEATHERS, JR., E. R. BRISCOE, J. E. BERBIG, F. G. MEADOWCROFT, C. H. GITTINGS, W. F. HARRISON, NATHAN BERKMAN, J. M. PARKER, EARL R. DEANER, B. J. SHANKWEILER, I. E. WAGNER, H. F. HANNY, W. A. SCOTT, H. W. HIGHFIELD, R. E. SATTERFIELD, SANFORD R. HALLIDAY, L. C. LECOMPTE, E. D. SAXTON, AND CLIFTON K. AREHART, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners R. E. Conner, Kenneth L. Knitter and Vincent L. Petenbrink, suing on behalf of themselves and all

others similarly situated, respectfully pray that a writ of certiorari issue in the above-captioned case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered therein August 1, 1949, R. 73, petition for rehearing denied October 5, 1949.

Opinions Below

The opinion of the District Court of the United States for the District of Columbia appears at pp. 60-62 of the record, and is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 177 F. 2d 854, and in 16 Labor Cases ¶ 65,276. It appears in the record at R. 65 to 72.

Jurisdiction

The jurisdiction of this Court is invoked under § 1254 of the Judicial Code.

The court of appeals denied a petition for rehearing with a memorandum (R. 84) on October 5, 1949. Time within which the petition for writ of certiorari might be filed by these petitioners was extended by order of Mr. Chief Justice Vinson on December 29, 1949, to and including February 2, 1950 (R. 90).

Questions Presented

1. Whether the employer, consistently with the Selective Training and Service Act of 1940, may reduce the seniority of petitioner veterans through transfer to petitioners' seniority roster of other veterans with retroactive seniority for the time of their war service, thus placing them ahead of petitioners, (a) where respondent veterans might have exercised an election to transfer prior to their entry into military service but neither did so nor indicated any interest in such transfer, (b) where respondent veterans had been carried and advanced on a different roster during their

war service and accorded a right to reemployment on that roster, and (c) where such predating of transfer is not, either by custom or collective-bargaining agreement, saved to employees on furlough or leave of absence.

2. Where the court has held that the employer has wrongfully withheld from petitioners a similar right to transfer to another roster with retroactive seniority and has also expressly found that no prejudice has resulted to the employer by the petitioners' failure earlier to demand this specific remedy, (a) whether petitioners are entitled to compensatory damages for their loss resulting from the employer's wrongful action; (b) whether to the extent that the grant of damages in such instances is discretionary, the discretion in the first instance can be exercised by a United States court of appeals; and (c) whether the attempted exercise of discretion respecting damages by the court below on review of a summary judgment which it finds to have been entered improperly—the motion for summary judgment itself in nowise having been directed at the question of damages and the court of appeals acting without brief, argument or evidence—constitutes an abuse of discretion.

Statutes Involved

The Selective Training and Service Act of 1940 (50 U. S. C. § 308; c. 720, 54 Stat. 885, §8, as amended) provides:

> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) [section 303 (b) of this Appendix] shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who

is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b) [section 303 (b) of this Appendix], each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or

court costs shall be taxed against the person so applying for such benefits.

Statement

Petitioners are three class suitors who are employees of The Pennsylvania Railroad Company on its Maryland Division who filed this action in the court below on behalf of themselves and other employees similarly situated, under the reemployment provisions of the Selective Training and Service Act of 1940, § 8(b), (c), c. 720, 54 Stat. 885, 891 (50 U. S. C. Appendix § 308[e]) (R. 11). Petitioners sought a declaratory judgment, injunction, accounting, and money judgment for their damages in accordance with the act (R. 23-24). Respondents are the employer The Pennsylvania Railroad Company (referred to throughout as the "Railroad") and the Brotherhood of Railroad Trainmen (referred to as the "Brotherhood"), its general manager and president, and 23 individual employees of the Railroad, whose employment with the seniority accorded to them it is alleged has unlawfully diluted the seniority of petitioners and members of their class upon the employment roster of the Railroad from which all of the trainmen, parties to this action, are employed. All of the trainmen, respondent or petitioner who are parties to this action are returned ex-servicemen who are protected by the provisions of the Selective Training and Service Act of 1940, above, or the identical provisions of two other statutes.[1]

The case arises out of the fact that two separate rosters for trainmen are maintained on the Maryland Division of the Pennsylvania Railroad where all of the trainmen parties are employed. One roster governs the employment

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[1] The Army Reserve and Retired Personnel Service Law of 1940, § 3, c. 689, 54 Stat. 858,860 (50 U. S. C. Appendix § 403[d]), as amended; and the Act of June 23, 1943, for Civilian Reemployment of Members of Merchant Marine, § 3, c. 142, 57 Stat. 162 (50 U. S. C. Appendix § 1473), as amended.

of passenger trainmen, the other that of freight trainmen. All of the trainmen parties to this action now appear on the passenger-trainmen roster; and the first alternative cause of action is directed to the proposition that respondent trainmen have been placed on that roster ahead of some of petitioner trainmen, or members of the class represented by them. (R. 18-19.)

Work as trainmen for respondent Railroad is not performed off the two rosters indiscriminately; a sharp freight and passenger discrimination exists, to the extent that there is no right to work in passenger service if one appears on the freight roster, and *vice versa*. With reference to current employment and excepting for a privilege to apply and be considered for transfer upon the occurrence of vacancies, the two employments are as completely alien as though they were for two separate employers. (¶ 12, R. 17-18.) Right of *promotion* exists only within the particular roster, and is entirely distinct from the question of *transfer*. (*Id.*)

The present dispute arises out of transfers from one roster to the other. The collective-bargaining agreement between respondent Railroad and respondent Brotherhood (as collective-bargaining agent under the Railway Labor Act) provides (R. 15):

> "1-D-3. (a) On a seniority district where, on the effective date of this Agreement, it is the practice to employ trainmen for passenger, or freight or yard service exclusively, when additional passenger trainmen are needed the applications of freight and yard trainmen on the said seniority district shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.
>
> "(b) When additional freight and yard trainmen are required on a seniority district where the practice referred to in paragraph (a) is in effect, the applications of passenger trainmen shall be given consideration,

after which the applications of switchtenders on that seniority district shall be considered.

"(c) Notice shall be published on bulletin boards giving the said trainmen and switchtenders reasonable time within which to file their applications."

It will be noted that there is thus a right of transfer from freight to passenger service as well as a right to transfer from passenger to freight service. It has been the practice of respondent Railroad ordinarily to employ trainmen first in the freight service, and to draw its passenger trainmen from the freight roster as freight trainmen applied whom it regarded as qualified (R. 42, 45, 46). This has not been an inveterate custom; for a number of passenger trainmen in the total group involved in this action never were employed on the freight roster and therefore have no "freight roster date" (R. 55-58). Asserted custom aside, the right of transfer is and has been contractual, as above quoted from the underlying collective-bargaining agreement, which was adopted August 14, 1942, and has since been amended (and so, as to unamended provisions, ratified) from time to time in respects herein immaterial (R. 14) (and see Exhibit A to the amended complaint in the unprinted record). In other instances, the employment on the freight roster was *pro forma*, since the same day or within a few days after entry upon the freight roster, the men involved were shown to have transferred to passenger service [2] (R. 55-58).

Upon a transfer, the collectively-bargained agreement provides (¶ 3-F-1, R. 16) that the transferring trainman shall acquire seniority on the new roster *from the date of transfer*.

---

[2] One of the named appellants, Petenbrink, was engaged on the freight roster on February 17, 1943, and was transferred to passenger service February 18, 1943 (R. 58, No. 302; 52). Numerous other examples are apparent from an inspection of respondent Railroad's list of persons involved and their passenger and freight dates (R. 55-58).

The collective-bargaining agreement also provides for exercising seniority "on an assignment or pool advertised and filled during" the absence on sickness, suspension, or leave of absence, but does not save the right of *transfer* which may have arisen during the furlough or absence; although even the right to exercise seniority on an assignment or pool is not saved if an absence is for thirty days or more. The agreement (the full provisions of which are in an exhibit lodged with the clerk) provides in these respects.

> "2-A-3. (a) A trainman returning to duty after being absent less than thirty days by reason of sickness, temporary disability, suspension, or leave of absence, shall be permitted to exercise his seniority on an assignment or pool advertised and filled during his absence, provided he exercises such right before he performs any road or yard service.
>
> "(b) A trainman who has been absent for any of the causes enumerated in paragraph (a) for a period of thirty days or more, upon his return to duty may exercise his seniority on any assignment or pool."

When various employees of the Railroad went into the military services during the war, it was assured to them under § 8 of the Selective Training and Service Act of 1940 that they would maintain their seniority with all rights and benefits which they would have had had they not been called into the service (R. 18). This has been interpreted to mean (see argument, post) that their names are retained on the seniority roster and advanced just as if they were not in the military service. And so here: those of the trainmen parties who appeared on the freight roster when they went into the service had their names retained on the freight roster and were advanced upon it as though actively engaged in the railroad work during all of the time they were in the military service. The same was true of the passenger

trainmen, who were similarly advanced on the passenger roster. Each might come back to his employment and find himself in the same relative position as when he left (R. 18-19).

But, upon their return from service, freight trainmen veterans were accorded an opportunity either to renew their freight employment with seniority accrued during their service, or to transfer to the passenger roster and assume passenger seniority—not from the date of transfer (as provided by the collective-bargaining agreement, ¶ 3-F-1, R. 16), but from a time which would place them ahead of the immediate junior freight or yard man accepted for passenger service after such freight trainmen entered into military service (R. 19). As shown by the Railroad's list, this yields the same result as if the transfer were as of the day each was furloughed for military service (R. 55-58). Those returning ex-servicemen on the freight roster who elected to transfer to the passenger roster, with accrued seniority during their service, are the trainmen respondents here. Petitioner passenger trainmen and members of the class represented by them were not accorded the equivalent right to transfer to the freight service with freight seniority accrued during the time they went into the service (R. 22). With the exception of one of the transferring respondent trainmen, none of them transferred actually at a time when vacancies existed on the passenger roster; and their applications for transfer were not submitted in response to notice as provided in Rule 1-D-3(c) (quoted R. 15) (R. 19).

The complaint prayed relief in the alternative. The first alternative cause of action complains that the respondent trainmen were allowed to transfer at all, since no vacancies existed; or, if transfer was proper, that they were placed on the roster as of a time earlier than their actual transfer; that in effect a double seniority was granted to respondent

trainmen when they returned from the service, thus *pro tanto* reducing the seniority of petitioners on the passenger roster, contrary to the Selective Training and Service Act. The second alternative cause of action, in the event the first one is held unfounded under the Selective Training and Service Act, asks that equivalent opportunity of elective seniority on the freight roster be tendered to petitioners (R. 22).

The complaint R. 21-22, asserts the grave and irreparable injury of petitioners and members of their class, the denial to them of employment in more desirable occupations, and the fact that some of them have and hereafter may be forced to abandon their occupation as trainmen to enable them to support and maintain themselves and their families. The complaint asks alternatively that (1) defendants be enjoined from maintaining the transferring freight trainmen upon the passenger roster or else from maintaining them upon that roster with a seniority dated earlier than the day as of which they actually transferred to passenger service; or (2) that the Railroad tender petitioners an opportunity to transfer to the freight roster with seniority equivalent to that which was accorded to respondent trainmen on the passenger roster, together with a tender of damages incurred through the Railroad's having failed to accord them an opportunity so to transfer following their return from military service. The complaint asks an accounting and damages.

Following the filing of the amended complaint R. 11, respondents moved to dismiss for failure to state a claim upon which relief can be granted, or in the alternative to enter a summary judgment (R. 31, 40). The district court granted both motions for summary judgment, both as to petitioners' original and alternative causes of action (R. 62-63).

That court considered that the right of transfer to the passenger roster was a valuable right which the freight trainmen might exercise had they not been in military service; that they would have availed themselves of the right had they not been absent in the service; that the Selective Training and Service Act therefore assured them the choice, which they had missed. Conversely, he felt that petitioner passenger trainmen would not have elected to exercise their right of transfer to the freight list and, therefore, they had no valuable right to be vindicated under the alternative requests for relief (R. 60-62). Petitioners have serious challenge of some of the statements of fact or the speculations of fact indulged by the learned Chief Justice of the district court, though we forebear a dissertation upon those errors at this time.

The court of appeals affirmed respecting the first cause of action and reversed as to the alternative. (Opinion of Prettyman, J., R. 65 to 72.) It held that the effect of § 8 (c) of the Selective Training and Service Act is to require that one who enters the military service must be given, upon his return, the same seniority which he would have had had he not been in the service; and that the opportunity to transfer by election of the employee was a privilege which he would have had had he not been in the service, so that it was proper to accord the retroactive seniority to the time when the transfer might have been availed of when the opportunities arose during the absence of the trainmen. It held that exactly the same rule which applies to returning veterans on the freight list applies also to petitioners, so that petitioners had wrongfully been denied an opportunity of transfer to the freight roster. Although the court held (R. 71) that "There is no showing that appellants' [earlier] failure to seek the proper relief resulted in any injury to the Railroad", it denied damages and an accounting (which had been prayed for in the complaint) on the theory that

petitioners had never demanded a transfer to the freight roster, and that it would be harsh to permit a service man to return to his job, keep silent for an extended period of time, even though fully aware of the circumstances, and then claim damages from his employer for his failure to offer him a right to a different job for which he never applied.

The issue of damages, in the event petitioners were entitled to transfer, was neither briefed nor argued to the court. By petition for rehearing, petitioners protested the ruling on the point in the absence of a hearing, and especially that there was a demand not later than the time when the amended complaint was filed; that a demand would have been refused in any event, so that it was not a prerequisite; that a demand had actually been alleged; that petitioners had not stood by idly with full knowledge of their rights, since the right to transfer had been studiously kept from petitioners by all of the respondents (as shown by various allegations of the complaint and by the affidavits); and finally that petitioners had made the sort of demand for reemployment which the Selective Training and Service Act expressly requires, which is all that the court might insist upon. The petition for rehearing was denied with a brief opinion *per cumiam* (R. 84). The court justified its action in disposing of the question of damages without brief or argument to that court on the ground that the alternative claim in the complaint asserted not only the right to transfer but the right to damages.

Specification of Errors To Be Urged

1. The court erred in holding that respondent trainmen were entitled, under the Selective Training and Service Act, to transfer to the passenger roster with seniority antedated as of a time shortly after they left for the service.

2. The court erred in denying petitioners damages and an accounting on their alternative cause of action which it sustained.

3. The court erred in passing on the issue of damages and an accounting in connection with the alternative cause of action.

4. The court erred in failing to hold petitioners entitled to relief under their first alternative cause of action.

Reasons for Granting the Writ

1. *Respondent trainmen were wrongfully accorded the right to transfer with seniority antedating that of petitioners; and the decision below is in conflict with the decisions in other circuits.*—The question of the right of a returning serviceman to return to the job which he left to enter the service, or to take some other job which he desires even though the job he left is available and his seniority has been maintained unimpaired in that position, is one which has frequently confronted the courts under the Selective Training and Service Act of 1940, and is of continuing importance under the Selective Service Act of 1948, c. 625, 62 Stat. 604, 615, § 9 (b) (B), (c), which renews the provisions as to a return to employment to "such position" as the veteran left. The present decision does not follow the line which has gradually become clearly established in the opinions of the various circuits.

The decisions have consistently interpreted the question whether the position to which the returning veteran aspired was "such position" as he left. The decision of the court below would be consistent with the existing decisions if this were a case where the rosters were tandem, so that reaching the top of one would permit the employee to go to the bottom of the other. In such case, the veteran would

reach the superior roster merely with the lapse of time; and it is part of his seniority right, protected by § 8 (c) of the Act, to go on the superior roster. As this Court stated in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 287, "the 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority".

In this case, the rosters are not tandem, so that either passenger or freight service is superior to the other; a man may well be content to spend his entire life in one or the other service; and in fact, where petitioners and members of their class transferred from freight to passenger, it usually was at the earliest opportunity after they were employed in the freight service (R. 55-58). Thus, it follows that the greater the freight seniority the less interest to transfer to passenger service. And in this case, with only one or two exceptions, every one of the twenty-three respondent trainmen (whose names are starred at R. 56-58) repeatedly passed up opportunities to transfer prior to the time he went into the service. This case, therefore, is like the cases next cited below, in each of which the returning veteran was held not to be entitled to transfer to the different roster with seniority antedated to a time while on furlough to military service. The decision below conflicts with these cases:

Hewitt v. *System Federation No. 152 Ry. Employees' Dept. A. F. L.* (C. C. A. 7th, 1947), 161 F. 2d 545, where the veteran missed an opportunity to be employed as a carman helper while away to the service with his seniority maintained on the car-cleaners roster. There, "the position" which he left was the position as car cleaner. Just so here: "the position" which respondent trainmen left was a position on the freight roster. On that roster their seniority was maintained unimpaired throughout their war service. To that roster they might properly return without impairing and diluting the seniority of petitioners.

Raulins v. *Memphis Union Station Co.* (C. C. A. 6th, 1948), 168 F. 2d 466. The veteran left the roster as electrician helper, and upon return, aspired to be an electrician. As in the present case, there were provisions of the collective-bargaining agreement for announcing vacancies on the electrician roster to helpers and giving helpers "preference" in filling them. And also as in the present case, there was no provision saving such rights to electrician helpers who were on furlough. The court of appeals held that it was improper to require advancement of the returning veterans to the other roster with seniority back-dated to the time the man junior to them on the helper's roster had been advanced during the time the veterans were in the service.

Spearmon v. *Thompson, Trustee Mo. Pac. Ry. Co.* (C. C. A. 8th, 1948), 167 F. 2d 626, cert. den. 335 U. S. 822, No. 148, O. T. 1948 (sub nom. *Thompson, Trustee* v. *Spearmon*) and 335 U. S. 886, No. 359, O. T. 1948 (sub nom. *Delozier* v. *Thompson, Trustee*); opinion on rehearing, 173 F. 2d 452. This case involved four men who had seniority as carmen helpers, where the collective-bargaining agreement provided when there were positions available for mechanics, helpers might be advanced to mechanic and paid mechanic's rates, but would not earn seniority as mechanics until three years on the mechanic job. One was inducted before being transferred to mechanic's work under the temporary arrangement. Three were transferred from a few weeks to 1½ years prior to induction into the service. Upon return from the service, all were first reinstated to the mechanics' roster and thereafter returned to the carmen helpers' roster. The court held as to the three who had actually transferred before going into the service that the mere passage of time entitled them to seniority as mechanics; otherwise as to the one who had not transferred to the work of a mechanic, even though had he remained in

the position of helper until reached in his turn, he would have been advanced. Accordingly, he was properly returned to "the position" he left—as a helper. The same rule would require the respondent trainmen here to be returned to their position on the freight roster, without the right to reduce or dilute petitioners' seniority which had been accruing while petitioners were in the service.

Special Service Co., Inc. v. *Delaney* (C. C. A. 5th, 1949), 172 F. 2d 16. The court of appeals reversed a district court ruling that a man who left the position of laborer on air-conditioning and electrical equipment of railroad passenger cars was entitled upon his return to be reinstated in the position of apprentice, since the man who had taken his position had been advanced to that position. Although the court felt that the employee was entitled to the return of his job as laborer, he was not entitled to such transfer as his successor achieved. The court followed its earlier decision in *Oil Workers International Union* v. *Sinclair Refining Co.* (C. C. A. 5th, 1948), 171 F. 2d 192, and the decisions of the Sixth Circuit in *Raulins* v. *Memphis Union Station Co., supra,* and *Maloney* v. *Chicago B. & Q. R. Co.* (W. D. Mo., 1947), 72 F. Supp. 124.

Boston & Maine R. Co. v. *David* (C. C. A. 1st, 1948), 167 F. 2d 722. There, a veteran was held entitled to restoration to his old permanent classification as sheet metal worker helper, even though he had been rated as sheet metal worker with a temporary designation when inducted—the employments being distinct.

Trischler v. *Universal Potteries, Inc.* (S. D. Ohio, 1947), 78 F. Supp. 609, aff'd. (6th C. C. A., 1948), 171 F. 2d 707. In this case each employee claimed a higher position which would have been offered to him in order of seniority had he not been away to war. But as in the present case, there was no provision for an employee to claim retroactively

opportunities missed because of leave of absence or furlough, and therefore each employee was denied the right to the other classification.

Each of the following cases is either in flat conflict with the decision below or tends to point to the incorrectness of the court's determination in this respect. One of the cases (*System Fed. No. 30*) is a decision of the National Railway Adjustment Board, the administrative body most skilled in dealing with these railroad matters and involving this same problem of the right of one who had refused opportunities to advance to a different classification prior to military service, but who claimed the right to displace the first man junior to him who was promoted following his induction. However, as none of the cases here cited is at one and the same time both the decision of a court of appeals and also in flat conflict, we cite these cases as indicative of the error below rather than as being of themserves the reason for granting the writ:

System Fed. No. 30, Ry. Emp. Dept. A. F. L. v. *Baltimore & O. R. Co.*, Award No. 1187, Nat. R. Adjustment Bd., 2d Div., Docket No. 1114.

Maloney v. *Chicago, B. & Q. R. Co.* (W. D. Mo., 1947), 72 F. Supp. 124.

Eaton v. *Atchison, T. & S. F. Ry. Co.* (U. S. D. C. Kans., 1948), — F. Supp. —, 14 Lab. Cases ¶ 64463.

Willoughby v. *Atchison, T. & S. F. Ry. Co.* (U. S. D. C. Kans., 1948), — F. Supp. —, 14 Lab. Cases ¶ 64464.

Harrison v. *Seaboard A. L. R. Co.* (E. D. So. Car., 1948), 77 F. Supp. 511.

Nevins v. *Curtiss-Wright Corp.* (C. C. A. 6th, 1949), 172 F. 2d 535.

Of interest also as showing that the rule adopted by the court below is out of line with the decisions heretofore arrived at under the Selective Training and Service Act, are

cases in the tandem-roster situation where the new designation was merely a promotion acquired by the mere lapse of time and in circumstances where there is no question that the veteran would have sought and received it had he not been in the service. In this group can be listed *Spearmon* v. *Thompson, Trustee*, dealt with above, insofar as are involved the men who were actually serving as mechanic when they were inducted and who would have acquired seniority as a mechanic with the mere lapse of time but for their induction. The other two cases are:

Morris v. *Chesapeake & O. R. Co.* (N. D. Ind., 1947), 75 F. Supp. 429, aff'd (C. C. A. 7th, 1948), 171 F. 2d 579, cert. den. 336 U. S. 967, No. 638, O. T. 1948.

Freeman v. *Gateway Baking Co.* (D. C. Ark., 1946), 68 F. Supp. 383.

2. *If petitioner trainmen were wrongfully denied an opportunity of transfer with retroactive seniority to the freight roster, they are entitled to compensatory damages for the employer's wrongful act; and the decision below is in direct conflict with the statute granting jurisdiction and with the uniform practice under the decisions in other circuits.*—If respondents were rightfully accorded transfer to the seniority roster of petitioners, then petitioners were unlawfully deprived of an equal right to transfer to the freight roster. The court below so held. But the court below denied damages because petitioners never demanded [3]

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[3] The statement of the court below that there is nothing to indicate a demand for transfer by petitioners or a refusal by the Railroad simply is contradicted by the record. There was certainly a demand when the amended complaint was filed, and the appellants, at the least, are entitled to damages from that date. The filing of the amended complaint in which was set forth the claim to the alternative relief was certainly a demand. *Kaufman* v. *Tredway*, 195 U. S. 271. If it be urged that the claim for alternative relief was not a demand because it asked for too much, or was conditional on the denial to appellants of their first cause of action, it is sufficient answer that the respondent Railroad did not tender performance and did not keep the tender good. The United States Court of Appeals

a transfer to the freight roster and it would be harsh to permit a serviceman to return to his job, keep silent for an extended period of time though fully aware of the circumstances, and then claim damages for the employer's failure to offer him a right to a different job for which he never applied. This it held despite expressly finding that (R. 71) "There is no showing that appellants' failure to seek the proper relief [i.e., the opportunity of transfer to the freight roster rather than protesting the transfer of respondent trainmen] resulted in any injury to the railroad."

The issue of damages, in the event petitioners were entitled to relief, was not raised by the motions for summary judgment (R. 31, 40), and was neither passed on by the district court, assigned as error in the court of appeals, briefed or argued. No evidence from which it might be inferred that petitioners had slept on their rights was ad-

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for the First Circuit said, *Trusteed Funds* v. *Dacey* (1947), 160 F. 2d 413, 422:

> "• • • We do not think a veteran necessarily loses all his rights under the Act merely because in applying for reemployment he couples such application with a demand for something he erroneously believes to be his due. If the employer then makes him an offer of reemployment which is in full compliance with the employer's obligation under the Act, and the veteran rejects the offer, then certainly this would foreclose any claim for interim damages for so long as the veteran stands on such rejection. Whether the veteran could withdraw such rejection, either within or after the 90-day period, and thus reinstate his employment rights, we do not now undertake to decide. *But if, in the case supposed, the employer does not make the veteran an offer of reemployment which is in full compliance with the employer's obligation under the Act, then the fact of the veteran's having asked for too much is of no legal consequence;* upon a complaint by the veteran under § 8, the court may order his reinstatement to the position to which he is entitled, *and may assess appropriate interim damages.*" (Italics added.)

This holding was reaffirmed and approved in *Boston & M. R. R.* v. *David* (C. C. A. 1st, 1948), 167 F. 2d 722, 725. And this accords with the law established in other cases by this Court. *Spalding* v. *Mason*, 161 U. S. 375, 396; *Storm* v. *Boker*, 150 U. S. 312, 341; and *Colby* v. *Reed*, 99 U. S. 560.

duced. To the contrary, the complaint (R. 9) and amended complaint (R. 20) specifically alleged that application for reemployment was duly made. The Act requires no other or further demand; when only that demand is made the Act, § 8(b)(B) provides the employer *shall* restore the veteran to "such position", and, § 8(c), that on such restoration the employee *shall* be considered as having been on leave or furlough, etc.[4] Beyond this, the complaint shows that petitioners had been completely without notice of any rights of retroactive transfer which respondent Railroad had privately agreed with the respondent Brotherhood might be accorded to the more numerous freight veterans only. The affidavit of one of the named petitioners (Petenbrink, R. 52) shows the prompt and repeated protests which he had made respecting the seniority accorded to freight veterans; the affidavits of the secretary and treasurer and both the past and present president of the local lodge of the Brotherhood, of which petitioners were members, were adduced to prove that information respecting the arrangement had been suppressed. R. 47-52. Also material is the fact that the Railroad and the Brotherhood throughout have opposed the right of petitioners to the transfer to which they were finally held entitled by the court below. It follows that a demand would have been futile; and therefore a demand,

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[4] The statutory language is the familiar language of command. *Railroad Co.* v. *Hecht*, 295 U. S. 168, 170; *Work* v. *Lynn*, 266 U. S. 161, 168-169; *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 359-360. As said in *Ex parte Jordan*, 94 U. S. 248, 251: "The language of the statute is 'shall be allowed', which means 'must be allowed' when asked for by one who stands in such relation to the cause that he can demand it." And as said by Mr. Justice Douglas in *Anderson* v. *Yungkan*, 329 U. S. 482, 485:

> "The word 'shall' is ordinarily 'the language of command'. *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same rule uses both 'may' and 'shall', the normal inference is that each is used in the usual sense —the one being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360."

as a matter of law, is not a prerequisite to relief, as it is obvious that it would be futile because it would certainly be refused. This is an old principle of law, for which lengthy citation of authorities should be unnecessary. See 26 Am. & Eng. Encyc. of Law, p. 44.

A. The Selective Training and Service Act, § 8(e), vests jurisdiction in "the *district* court of the United States for the district in which such private employer maintains a place of business" with power "to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action." The decision of the court below, whereby it seized this jurisdiction for itself without regard to how the discretion of the district court may have been exercised after trial of the issue, not only conflicts with the express language of the statute, but conflicts with a uniform interpretation of this language whereby the various other circuit courts of appeal have remanded such questions for exercise of the discretion by the district court.

Thus, in *John S. Doane Co.* v. *Martin* (C. C. A. 1st, 1947), 164 F. 2d 537, 541:

> "• • • The Act provides that the district court shall have power to compensate him for any loss of wages resulting from an employer's unlawful refusal to reinstate him to his former position. As was said in Bentubo *v.* Boston and Maine Railroad, 1 Cir., 160 F. 2d 326, the district courts have discretionary power to reduce the damages under the Act. . . . In the matter of the mitigation of damages, the burden is upon the respondent to produce evidence showing the amount of money the petitioner did earn, or with reasonable care and diligence could have earned, and since there is to be a new trial evidence to this effect should be present. . . ."

And in *Special Service Co., Inc.* v. *Delaney* (C. C. A. 5th, 1949), 172 F. 2d 16, 20, where the employee was held to be entitled to damages from the period between his first application and the date of the employer's first offer to reinstate him, the court said "Further proceedings in this regard are within the discretion of the district court. We shall, therefore, remand the cause to that court with the single limitation that recovery be limited to the above-specified period." So in *Schreier* v. *M. H. Fishman Co.,* (C. C. A. 3d, 1948), 176 F. 2d 722, the court held that the veteran was not shown to have waived his rights or to have estopped himself from enforcing his rights under the act and remanded the case with instructions to the district court to resolve questions respecting application for reemployment and determination of the amount which the employee would have received had the employer complied with the act. In *Allyn* v. *Abad* (C. C. A. 3d, 1948), 167 F. 2d 901, 904, a situation was met which was exactly similar to that below: In both cases the district court had incorrectly held that the veteran was not entitled to any of the reemployment rights which he asserted, and its decision was reversed. But the court in that case held:

> "From the foregoing, it becomes clear that petitioner is entitled to restoration. Whether compensation is likewise due him, under the principles enunciated in Van Doren *v.* Van Doren Laundry Service, supra, is a question upon which the court below was not required to pass, because of its conclusion that under the circumstances it was not incumbent upon respondent to restore petitioner. Our ruling to the contrary makes it appropriate that *the cause be remanded to the court below for determination of the compensation question which still remains.*" (Italics added.)

Typical also is *Levine* v. *Berman* (C. C. A. 7th, 1947), 161 F. 2d 386, cert. den. 332 U. S. 792, No. 307, O. T. 1947, in which the court held that the district court must determine

the right of the veteran to damages. Thereupon, the district court did consider the matter and concluded that the veteran had been guilty of fraud and bad faith and had estopped himself from obtaining damages. The court of appeals affirmed that determination in *Levine* v. *Berman,* 178 F. 2d — (decided December 19, 1949).

B. Denial of compensation without a hearing in this case was an abuse of discretion, even if the circuit court of appeals had the power to exercise a discretion in the circumstances. Unless petitioners are not shown by this record to have been guilty of conduct estopping them from enforcing their rights, they are entitled under the act to such damages as they may be able to show. It has been flatly held in the Third Circuit that, although the district court did have a discretion to grant or withhold compensatory damages, that discretion is abused in the absence of a showing of a waiver or wrongful conduct on the part of the veteran. The court said in *Van Doren* v. *Van Doren Laundry Service* (C. C. A. 3d, 1947), 162 F. 2d 1007, 1011, 1012:

> "• • • We find it unnecessary to pass upon the issue at this time; for, under the view we take of the case sub judice, even if the granting of compensation be deemed discretionary, we believe that denial in the instant case was improper.
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> "Having determined that a money judgment should also have been granted petitioner, we must reverse the judgment and remand for computation of the sum due him. As we have indicated above, petitioner's right to reinstatement matured when he received his honorable discharge on December 27, 1944. See Tipper v. Northern Pac. Ry. Co., D. C., 1945, 62 F. Supp. 853. This raises the question whether the delay in filing suit defeats petitioner's right. If the delay is not attributable to petitioner, it follows that petitioner was entitled not only to reinstatement, but also to compensation

with interest thereon for the period of December 27, 1944 to December 27, 1945. See Dodds v. Williams, D. C. 1946, 68 F. Supp. 995, 997."

As we have shown above, not only is the record without any showing that petitioners delayed unreasonably demanding their rights, but respondent employer itself was in a great measure responsible for such delay in seeking the specific relief accorded below as has occurred. In such circumstances, the Fifth Circuit has rejected the rule which was adopted by the court below. There, the court said in *Watkins Motor Lines, Inc.* v. *De Galliford* (C. C. A. 5th, 1948), 167 F. 2d 274, 275:

> "As to the third question above mentioned, we agree with the court below that the veteran made every reasonable effort to secure re-employment amicably before filing suit, and should not be charged with undue delay in filing this action. The appellant itself was responsible for much of the delay."

We do not urge that damages are due to petitioners as a penalty upon respondent Railroad. What we are asking is the opportunity to prove our damages and to be compensated for the actual losses which petitioners have suffered.

Conclusion

The writ should be granted.

Respectfully submitted,

JOHN W. CRAGUN,
THOMAS SEARING JACKSON,
RILEY A. GWYNN,
Counsel for Petitioners.

GEORGE R. STEWART,
CARL G. LUTZ,
Of Counsel.